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NOR AZAHAR ZAINOL v. PENTADBIR TANAH LANGKAWI & ORS

HIGH COURT MALAYA, ALOR SETAR
CHOO KAH SING JC
[CIVIL SUIT NO: 21NCVC-8-5-2014]
B 15 JANUARY 2017

LAND LAW: *Malay reservations – Transfer to non-Malay – Land proprietor entered into sale and purchase agreement with non-Malay for sale of Malay Reservation land – Whether sale and purchase agreement valid – Whether*
C *ownership of land ought to be restored to land proprietor – Whether purchaser entitled to purchase price – Whether land was Malay Reservation land – Whether there was explanation as to why new title deed was not endorsed with words 'Rizab Melayu' when it was issued – Failure of witness to appear in court – Evidence Act 1950, s. 114(g) – National Land Code, s. 215(2) – Enactment No. 63*
D *(Malay Reservations)*

The plaintiff and the fourth defendant, a non-Malay, entered into a sale and purchase agreement ('the SPA') for the sale of a piece of land ('the land') from the former to the latter. Alleging that the land could not be transferred to the fourth defendant as it was a Malay Reservation land ('MRL'), the plaintiff
E initiated this claim and sought (i) for a declaration that the SPA was void *ab initio*; and (ii) to restore the ownership of the said land to him and to refund the purchase price to the fourth defendant. The fourth defendant argued that the land was not an MRL as (i) there was no endorsement of 'Rizab Melayu' on the new title deed of the land'; (ii) in 2005, the boundaries of the township
F of Kuah in Langkawi were re-drawn, resulting in the land becoming part of the township of Kuah and falling within the exception stated in the Kedah Government Gazette No. 1180 ('Gazette No. 1180') which provides that the whole of Mukim Kuah in the District of Langkawi shall be Malay Reservation except the sanitary board area and township of Kuah. In the
G alternative, the fourth defendant argued that, in the event the court finds in favour of the plaintiff and the said land was an MRL, then the fourth defendant shall hold the first, second and third defendants responsible and liable for his losses as they failed to endorse on the present title deed that the said land was an MRL. The fourth defendant counterclaimed, *inter alia*, for
H (i) all costs and expenses incurred by the fourth defendant on the land, including the costs of levelling the said land; and (ii) damages for the losses suffered by the fourth defendant, including all costs and expenses incurred by the fourth defendant for entering the SPA. The issues that arose for the court's adjudication were, *inter alia*, (i) whether the land was an MRL; (ii) whether the SPA was valid; and (iii) whether it was a dealing.

I

Held (allowing claim and counterclaim; order accordingly):

(1) The township of Kuah referred to in Gazette No. 1180 was the township of Kuah with the demarcated and designated boundaries as at 4 May 1993 and not the township of Kuah with expanded boundaries as at 1 January 2005. The land was outside the then boundaries of the town of Kuah at the time of the publication of the Gazette No. 1180. Therefore, the status of the land was clearly a MRL. Furthermore, a declaration under s. 4 of the Enactment No. 63 (Malay Reservations) ('Enactment No. 63') was made in Gazette No. 1180 declaring the land to be a MRL. Clearly, the only way to remove a declaration of a land as MRL is to formally revoke it under the State law. In this case, the declaration of MRL in relation to the land that was made in Gazette No. 1180 had not been revoked. (paras 27, 32, 34 & 38)

(2) It was material for the second defendant to explain as to why the new title deed was not endorsed with the words 'Rizab Melayu' when it was issued. Since the second defendant failed to appear as a witness in court to explain, s. 114(g) of the Evidence Act 1950 was invoked to presume that the second defendant withheld material evidence which, if produced, would be adverse to the second defendant's case. (para 37)

(3) The SPA was invalid because it contravened s. 8 of the Enactment No. 63. The transaction was a dealing as envisaged by the definition of 'dealing' in s. 5 of the National Land Code. The effect of the SPA falls squarely within s. 215(2) of the NLC which is in Division IV of the NLC read together with s. 6 of the Enactment No. 63. It was evidently clear that the SPA was void *ab initio*. (paras 42 & 44)

(4) The plaintiff should compensate the fourth defendant for the costs and expenses incurred by the fourth defendant on the land, such as the costs of levelling the land since the plaintiff will obtain a benefit from the improvement of the land. The second defendant was liable to pay damages to the fourth defendant in relation to the costs and expenses incurred by the fourth defendant for entering the SPA as the second defendant failed to insert any endorsement of MRL for the said land in the new title deed. (paras 50 & 51)

Legislation referred to:
Enactment No 63 (Malay Reservations), ss. 2, 4(a), (b), 6, 10
Evidence Act 1950, s. 114(g)
National Land Code, ss. 5, 11(d), 215(2)

For the plaintiff - Ranjit Singh; M/s Ranjit Singh Dhillon & Co
For the 1st, 2nd & 3rd defendants - Nur Hafiedzah & Nurul Lizyana; DPPs
For the 4th defendant - Jannu Babjan; M/s Chamber of Jannu Babjan; DPP

Reported by Najib Tamby

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JUDGMENT

Choo Kah Sing JC:

Introduction

[1] The plaintiff sought for, *inter alia,* a declaration that a sale and purchase agreement entered into between the plaintiff and the fourth defendant over a piece of land which is registered and described in a title deed as HS(D) 914, PT 640, Bandar Kuah, Daerah Langkawi, Kedah (hereinafter referred to as 'the said land') is void *ab initio.* This title deed of the same land is hereinafter referred to as "the new title deed".

[2] Previously, the said land was registered and described in a title deed as Hakmilik 1995, Lot 653, Mukim Kuah, Sungai Taum, Daerah Langkawi, Kedah (hereinafter referred to as 'the old title deed').

Brief Facts

[3] On 18 April 2006, the plaintiff and the fourth defendant entered into a sale and purchase agreement (hereinafter referred to as 'the sale and purchase agreement), and the plaintiff agreed to sell and the fourth defendant agreed to purchase the said land for a sum of RM1,100,000 (hereinafter referred to as 'the purchase price'). The fourth defendant has paid the purchase price in full to the plaintiff.

The Plaintiff's Case

[4] The plaintiff sought, *inter alia*, a declaration that the sale and purchase agreement is void *ab initio.* The plaintiff contended that the subject matter, ie, the said land, could not be transferred to the fourth defendant, because it is a Malay Reservation Land (hereinafter referred to as 'MRL'), and the fourth defendant is not a Malay. The plaintiff seeks to restore the ownership of the said land to him and to refund the purchase price to the fourth defendant.

The Fourth Defendant's Case

[5] The fourth defendant contended that the land is not a MRL. His contention is premised on the fact that there is no endorsement of 'Rizab Melayu' on the new title deed of the said land.

[6] The fourth defendant admitted that the said land was previously an MRL, but argued that it is no longer an MRL. During the trial, the fourth defendant adduced evidence to support his contention as to why the said land is no longer an MRL.

[7] The fourth defendant contended that in 2005, the boundaries of the township of Kuah in Langkawi were re-drawn. As a result of the re-drawing of the boundaries, the said land has become part of the township of Kuah. Since the said land has become part of the township of Kuah, it falls within the exception stated in the Kedah Government Gazette No. 1180 (hereinafter

referred to as the 'Gazette No. 1180'). Gazette No. 1180 states that the whole of Mukim Kuah in the District of Langkawi shall be Malay Reservation except the sanitary board area and township of Kuah.

[8] In the alternative, the fourth defendant argued that in the event this court finds in favour of the plaintiff that the said land is an MRL, then the fourth defendant shall hold the first, second and third defendants responsible and liable for his losses, because they have failed to endorse on the present title deed that the said land is an MRL.

The First, Second And Third Defendants' Case

[9] The first, second and third defendants' contentions were different from the fourth defendant's contentions. The first, second and third defendants contended that the said land is an MRL at all material times, whether before or after the re-drawing of the boundaries of the township of Kuah in 2005, despite the fact that there is no endorsement in the new title deed stating that the said land is an MRL. The first, second and third defendants also contended that only the Ruler-in-Council in the State of Kedah has the power and jurisdiction to decide whether a State land in the State of Kedah is or is not an MRL.

[10] The first, second and third defendants refuted the fourth defendant's alternative argument that they were responsible and/or liable for the fourth defendant's losses, if any.

[11] The above is the crux of the parties' contentions in the suit.

Issues To Be Tried

[12] The parties have agreed that the issues to be tried are as follows:

(i) Whether the said land is an MRL or not;

(ii) Whether the sale and purchase agreement entered into between the plaintiff and the fourth defendant is valid or not.

(iii) Whether the sale and purchase agreement entered into between the plaintiff and the fourth defendant is a dealing or not.

(iv) Whether the plaintiff's claim should be allowed.

(v) Whether the fourth defendant's counterclaim should be allowed.

The Findings Of This Court

First Issue – Whether The Said Land Is An MRL Or Not

[13] The suit, including the fourth defendant's counterclaim, centres on one main issue which is whether the said land is an MRL or not. Once this main issue has been dealt with, the answers to the other issues will fall into place.

[14] The plaintiff's counsel submitted that the said land is an MRL for the reasons set out below.

[15] The plaintiff's counsel submitted that it is not in dispute that the old title deed clearly stated that the said land was an MRL. The said land was once owned by a third party, who failed to pay the necessary quit rent for the said land. As a result, the State Government had forfeited the said land. The ownership of the said land had reverted to the State Government. The said land had become a State land before it was re-alienated to the plaintiff. On 5 March 2006, the new title deed of the said land was issued by the second defendant, and the plaintiff was registered as the owner of the said land.

[16] The plaintiff's counsel submitted that although there is no endorsement in the new title deed that the said land is an MRL, the absence of such an endorsement that would not preclude the land from being an MRL. This is because the status of the said land remains as an MRL by virtue of the Gazette No.1180.

[17] The plaintiff's counsel further submitted that the status of an MRL could not be removed except by way of express revocation made pursuant to s. 4(b) of the Enactment No. 63 (Malay Reservations) (previously known as Malay Reservations Enactment, 6/1349) (hereinafter referred to as Enactment No. 63) which states as follows:

> The Ruler-in-Council may at any time either at its own instance or upon the application of any person by declaration in the *Gazette*:
>
> a) alter the limits or boundaries of any Malay Reservation, or
>
> b) revoke any declaration under section 3, either as the whole or any part of the area therein referred to, or
>
> c) include in any Malay Reservation any land excluded therefrom.
>
> Such declaration shall take effect on publication thereof in the *Gazette*.

[18] In other words, only the Ruler-in-Council could remove the status of Malay Reservation of any land in the State of Kedah.

[19] The plaintiff's counsel submitted that the State Council had exercised the power vested in it by s. 4(a) of the Enactment No. 63 when it declared and published in the Gazette No. 1180 on 4 April 1933 that the whole of Mukim Kuah in the District of Langkawi shall be Malay Reservation except sanitary board area and township of Kuah. At the time of the Gazette No. 1180 was published, the said land was indeed outside the township of Kuah. Hence, the said land was an MRL at that material time, and that status shall continue until it is expressly revoked under s. 4(b) of the Enactment No. 63.

[20] To counter the submission of the plaintiff's counsel, the fourth defendant's counsel submitted that the said land is stated to be situated in the township of Kuah in the new title deed. The fourth defendant's counsel submitted that the boundaries of the township of Kuah was enlarged pursuant to a Government Gazette No. 26 dated 16 December 2004 (hereinafter referred to as Gazette No. 26) which took effect on 1 January 2005, and since then the said land has been included in the township of Kuah. The new title deed of the said land contains the description 'Bandar Kuah'. In other words, the said land is now within the exception of the Gazette No. 1180, ie, excluded from being a Malay Reserved land, the fourth defendant's counsel argued.

[21] The fourth defendant's counsel's submission seems persuasive at the first blush, but this court could not accept the submission for the following reasons.

[22] First, the Government Gazette No. 26 dated 16 December 2004 (see D61), which the fourth defendant's counsel had relied on for his argument, states as follows:

National Land Code
(Act 56 of 1965)

DIVISION OF TOWN AND VILLAGE BOUNDARIES OF KEDAH DARUL AMAN

NOTIFICATION UNDER PARAGRAPH 11(d)

In exercise of the powers conferred by paragraph 11(d) of the National Land Code 1965, the State Authority hereby divides the boundaries of Town and Village of Kedah Darul Aman as set out in the Schedule I hereto and delineated upon certified plans Gazette P.W. No. as set out in the Schedule II deposited in the office of the Director of Survey Kedah/Perlis from 1st January 2005

2. This Notification shall be deemed to have come into force with effect from 1st January 2005.

Schedule I

List Of Town Lands And Village Lands For Every District In The State Of Kedah For The Purpose Of Revision Of Rents 2005

District/Sub-District	Town Land Area		Village Lands
	A	B	
…			
10. Langkawi	1. Kuah	Nil	Telok Datai

Schedule II

List Of Town Lands And Village Lands For Every District In The State Of Kedah For The Purpose Of Revision Of Rents 2005

District/Sub-District		Town Land Area		Village Lands	
	A	PW No.	B	PW No.	PW No.
…					
10. Langkawi	1. Kuah	2593	Nil	Telok Datai	2596

[23] The power relied on by the State Authority to divide the boundaries of the town and village of the State of Kedah Darul Aman is s. 11(d) of Chapter 2 of the National Land Code (NLC) which states as follows:

> The State Authority may by Notification in the *Gazette*
>
> (a) …;
>
> (b) …;
>
> (c) …;
>
> (d) after the survey or definition thereof by or on behalf of the Director of Survey, declare any area of the State to be a town or village.

[24] The State Authority had in the titles of Schedules I and II to Gazette No. 26 expressly stated that the object of the State Authority's exercise of the power conferred upon it by s. 11(d) of the NLC was "for the purpose of revision of rents 2005".

[25] The State Authority's expansion of the boundaries of the township of Kuah in 2005 was for the sole purpose of revision of rents for the affected lands.

[26] Secondly, although the new title deed which describes the said land as situated in the township of Kuah or 'Bandar Kuah' was issued by the second defendant, this does not mean that the said land has now come within the exception of the Gazette No. 1180.

[27] The Gazette No.1180 was published on 4 April 1933. The then State Council had exercised the powers conferred under s. 4(a) of the Enactment No. 63, to declare the whole of Mukim Kuah in the District of Langkawi as Malay Reservation land, except for the sanitary board area and township of Kuah. The township of Kuah referred to in the Gazette No. 1180 was the township of Kuah with the demarcated and designated boundaries as at 4 April 1993, and not the township of Kuah with expanded boundaries as at 1 January 2005. It is not in dispute that the said land was outside the then boundaries of the township of Kuah at the time of the publication of the Gazette No. 1180. Therefore, the status of the said land was clearly an MRL.

[28] Thirdly, flowing from above, the publication of Gazette No. 26 was not meant for revocation of any Malay Reservation land; it was meant for the purpose of revision of rents 2005.

[29] Although the boundaries of the township of Kuah has been enlarged for the purpose of revision of rents, Gazette No. 26 could not be construed to have the effect of revoking the declaration of MRL status over the affected lands.

[30] This court is of the considered view that the Gazette No. 26 could not supersede the express provision of the State law which states that only the Ruler-in-Council could revoke any land which has been declared as a Malay Reservation land (see s. 4(b) of the Enactment No. 63 as recited above).

[31] This court is also of the considered view that the Gazette No. 26 could not circumvent the power of the Ruler-in-Council conferred by s. 4 of the Enactment No. 63. Only a gazette made in pursuant to s. 4(b) of the Enactment No. 63 could revoke the MRL status of a piece of land. The Gazette No. 26 was not made pursuant to s. 4 of the Enactment No. 63; it was made pursuant to s. 11(d) of the National Land Code.

[32] Fourthly, the status of the said land as MRL could not have been removed or changed when the forfeiture of the said land took place on 15 December 1999. The status of the said land as MRL remains until it is revoked by the Ruler-in-Council. The State Government did not have the power to revoke the MRL status of the said land by way of forfeiture and reversion of the said land.

[33] Section 2 of the Enactment No. 63 defines "Reservation land" as follows:

> 'Reservation land' means land situate within an area which has under the provisions of Section 3 or Section 4 been declared to be, or to be included in a Malay Reservation, such declaration not having been revoked.

[34] A declaration under s. 4 of the Enactment No. 63 was made in the Gazette No. 1180 whereby the said land was declared to be an MRL. Clearly, the only way to remove a declaration of a land as MRL is to formally revoke it under the State law. In the present case, the declaration of MRL in relation to the said land that was made in the Gazette No. 1180 has not been revoked.

[35] Lastly, the first, second and third defendants' witnesses, namely DW7 and DW8, who are from the Pejabat Pengarah Tanah dan Galian Negeri, Kedah and Pejabat Pentadbir Tanah Daerah Langkawi, Kedah respectively, had testified that the said land is still an MRL. Their testimony was premised on the Enactment No. 63 and the Gazette No. 1180.

[36] The question that arises is why is the endorsement for MRL not found in the new title deed of the said land? DW7 informed the court that the power to endorse any conditions or restrictions on a title deed of a land is given to the second defendant, ie, the Pendaftar Surat-Surat Hak Milik Tanah. DW7 could not explain why the endorsement of MRL was not made in the new title deed of the said land. Likewise, DW8 also could not explain why the endorsement of MRL was not made in the new title deed of the said land. The second defendant did not come to court to give evidence, and there was no witness who could speak on his/her behalf.

[37] This court finds that it is material for the second defendant to explain as to why the new title deed was not endorsed with the words 'Rizab Melayu' when it was issued. Since the second defendant has failed to appear as a witness in court to explain why the Pendaftar did not endorse the new title deed with the words 'Rizab Melayu' when he/she issued the new title deed, therefore, this court accepted the submission of the fourth defendant's counsel to invoke s. 114(g) of the Evidence Act 1950 to presume that the second defendant has withheld material evidence which if produced it would be adverse to the second defendant's case.

[38] In conclusion, based on the above analysis, this court finds that the status of the said land remains as an MRL.

[39] This court's finding, after a full trial, is in line with the previous decision pronounced by this court on 3 March 2015 pertaining to a striking out application filed by the first, second and third defendants (see encl. 29). Further, on 26 October 2010, Justice Mohd Azman bin Husin has held in his judgment *via* civil suit No. 24-154-2010 that the said land is a Malay Reservation land. Unfortunately, the fourth defendant's contention was not ventilated before the learned High Court Judge in that suit.

Other Issues

[40] Flowing from the above finding, this court finds the sale and purchase agreement is invalid because it has contravened s. 8 of the Enactment No. 63 which states as follows:

> (1) No State land included in a Malay Reservation shall be sold, leased or otherwise disposed of to any person who is not either:
>
> (a) a Malay; or
>
> (b) a Siamese certified by the Director in writing to be a Siamese agriculturist permanently resident in the State.
>
> (2) The provisions of sub-section (1) shall not affect the rights of any holder of a Surat Akuan where such rights were acquired prior to the inclusion of the land comprised in such Surat Akuan in a Malay Reservation.

[41] With regard to whether the sale and purchase agreement entered into between the plaintiff and the fourth defendant was or was not a dealing, this court is of the considered view that the transaction was a dealing as envisaged by the definition of 'dealing' in s. 5 of the NLC which states as follows:

> 'dealing' means any transaction with respect to alienated land effected under the powers conferred by Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order.

[42] The effect of the sale and purchase agreement falls squarely within s. 215(2) of the NLC which is in Division IV of the NLC. Section 215(2) states:

> (2) The title of the transferor shall pass to and vest in the transferee upon the registration of any such transfer, together also with the benefit of any registered interests then enjoyed with the land.

[43] Section 6 of the Enactment No. 63 which states as follows:

> (1) Save as hereinafter provided in this Enactment, where any Reservation land is held under a document of title by a Malay, no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not a Malay and where any Reservation land is held under a document of title by a Siamese no right or interest therein shall vest, whether by transfer, sale in execution of a decree, sale at the instance of a chargee or otherwise, in any person who is not either a Malay or a Siamese.
>
> (2) Any document or agreement purporting to vest in any person any right or interest contrary to the provisions of sub-section (1) shall be void.

[44] Reading s. 215(2) of the NLC and s. 6 of the Enactment No. 63 together, it is evidently clear that the sale and purchase agreement is void *ab initio*.

Purported Transfer Of Ownership Of The Said Land

[45] On 19 June 2016, the fourth defendant had effected the transfer of the ownership of the said land from the plaintiff to himself using a power of attorney dated 22 August 2006 (PD135/2006 – see P4) that had been given to him by the plaintiff earlier. The transfer of the ownership of the said land which was effected by the fourth defendant when this court proceeding was still pending is frowned upon by this court.

[46] Based on the earlier findings of this court and pursuant to s. 10 of the Enactment No. 63 which states as follows:

> No power of attorney:
>
> (a) whereof the donee or any donee is not a Malay, if it relates to Reservation land held by a Malay under any document of title;

A (b) whereof the donee or any donee is not either a Malay or a Siamese if it relates to Reservation land held by a Siamese under any document of title;

shall be irrevocable or shall be valid for more than three years

B This court finds the power of attorney dated 22 August 2006 given by the plaintiff to the fourth defendant was invalid as it is stated to be irrevocable, in contravention of s. 10 of the Enactment No. 63. At p. 3 (see p. 61 of ikatan dokumen bersama) of the power of attorney, it was stated as follows:

I hereby confirm that this Power of Attorney was created with valuable consideration and irrevocable.

C

[47] Be that as it may, even if the power of attorney was valid, this court finds that the power of attorney had expired on 22 August 2009, because s. 10 of the Enactment No. 63 provides that such power of attorney could only be valid for three years.

D **[48]** Therefore, this court finds that the transfer of ownership of the said land from the plaintiff to the fourth defendant is illegal.

Fourth Defendant's Counterclaim

[49] The fourth defendant has counterclaimed, *inter alia*, for the following:

E (i) all costs and expenses incurred by the fourth defendant on the said land, including the costs of levelling the said land; and

(ii) damages for the losses suffered by the fourth defendant including for all costs and expenses incurred by the fourth defendant for entering into the said sale and purchase agreement.

F

[50] This court holds that the plaintiff should compensate the fourth defendant for the costs and expenses incurred by the fourth defendant on the said land, such as the costs of levelling the said land, because the plaintiff will obtain a benefit from the improvement of the said land.

G **[51]** This court holds that the second defendant is liable to pay damages to the fourth defendant in relation to the costs and expenses incurred by the fourth defendant for entering into the sale and purchase agreement as the second defendant had failed to insert any endorsement of MRL for the said land in the new title deed.

H

Conclusion

[52] Based on the above findings, this court hereby makes the following orders:

(i) that the sale and purchase agreement is void *ab initio*;

I (ii) that the fourth defendant shall surrender the title deed of the said land to the first or second defendant within seven days from the date of this order; and

(iii) that upon the receipt of the title deed of the said land from the fourth defendant:

(a) the first or second defendant shall cancel the transfer of the registered ownership of the said land that was effected *via* Perserahan No. 9361/2016 on 19 June 2016 in favour of the fourth defendant; and

(b) the second defendant shall correct the title deed by inserting the endorsement 'Rizab Melayu' on the title deed for the said land; and

(c) the second defendant shall register plaintiff as the registered proprietor of the said land on the corrected title deed; and

(iv) that the plaintiff shall forthwith refund the said sum of RM1,100,000 to the fourth defendant upon the fourth defendant having surrendered the title deed to the first or second defendant; failing which interest shall be chargeable at the rate of 5% per annum calculated on the sum of RM1,100,000 as late payment interest until the date of full payment of the said sum RM1,100,000 by the plaintiff;

(v) that the plaintiff shall pay to the fourth defendant all costs and expenses incurred by the fourth defendant on the said land, including the costs of levelling the said land, and that such amount for the said costs and expenses shall be assessed by the Senior Assistant Registrar or agreed between the plaintiff and the fourth defendant;

(vi) that the second defendant shall pay to the fourth defendant damages for the losses suffered by the fourth defendant in relation to costs and expenses incurred by the fourth defendant for entering into the said sale and purchase agreement, and that such amount for the said damages shall be assessed by the Senior Assistant Registrar or agreed between the second defendant and the fourth defendant, and that the said damages shall exclude the costs and expenses incurred by the fourth defendant in connection with the transfer of ownership of the said land effected by the fourth defendant *via* Perserahan No. 9361/2016 on 19 June 2016, including the sum paid for the stamp duty for the said transfer;

(vii) that the fourth defendant is to pay costs of RM20,000 to the plaintiff; and

(viii) that the second defendant is to pay costs of RM5,000 to the fourth defendant.